IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:18-cv-00981-CMA-MEH

HEIDI GILBERT,
AMBER MEANS,
MANDY MELOON,
GABRIELA JOSLIN,
KAY POE,
and JANE DOES 6-50,
Plaintiff(s),

v.

UNITED STATES OLYMPIC COMMITTEE,
USA TAEKWONDO INC.,
U.S. CENTER FOR SAFESPORT,
STEVEN LOPEZ,
JEAN LOPEZ,
and JOHN DOES 1-5,
Defendant(s).

DEFENDANT UNITED STATES OLYMPIC COMMITTEE'S OBJECTIONS TO THE RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE (Dkt. 218)

Pursuant to Federal Rule of Civil Procedure 72(b), the United States Olympic Committee ("USOC") respectfully objects to the Recommendation of the United States Magistrate Judge ("Recommendation") (Dkt. 218) regarding the USOC's Motion to Dismiss (Dkt. 108), specifically with respect to Claims 9, 19, 20, and 21.

I. STANDARD OF REVIEW

"The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to," and "may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3).

II. OBJECTIONS

A. TVPA Forced Labor (Claim 9 – Plaintiff Means)

To state her claim under 18 U.S.C. § 1589(b), Plaintiff Means must plausibly allege that the USOC (1) knowingly benefitted from (2) participation in a venture that has engaged in acts of forced labor/services, (3) knowing or in reckless disregard of the fact that the venture has engaged in acts of forced labor/services. The magistrate judge (1) wrongly interpreted the term "venture"; (2) disregarded the requirement that a defendant *participate* in that venture; and (3) incorrectly found that Plaintiffs plausibly allege the USOC *benefitted* from Steven Lopez's alleged acts of forced labor.[1]

1. The Magistrate Judge Erred in Finding the SAC Alleges the USOC's Participation in a Venture Under 18 U.S.C. § 1589(b).

a) The SAC does not allege a forced labor venture between the USOC and Steven Lopez.

Section 1589(b) of the TVPA requires a showing of the defendant's "*participation in a venture which has engaged* in the providing or obtaining of" forced labor or services. This language is identical to that in Section 1591(a)(2) of the TVPA, which imposes liability for "*participation in a venture which has engaged in*" sex trafficking. The plain language of both statutory provisions requires that the *venture* engaged in the prohibited activity—*i.e.*, forced labor or sex trafficking.

Case law interpreting these sister provisions confirms this plain reading of the statute. In *United States v. Afyare*, the Sixth Circuit employed basic statutory interpretation principles to determine that, in the context of Section 1591(a), the

[1] The magistrate judge also erred in finding the SAC alleges the USOC knew of Steven Lopez's alleged acts of forced labor *against Amber Means*. Dkts. 108 at 9-10; 155 at 2-3. Allegations that the USOC knew of complaints of abuse by *another* athlete—Ms. Meloon, in 2006—do not plausibly establish the USOC knew of Steven Lopez's alleged forced labor of Ms. Means in 2013. *See* Rec. 39.

"venture" at issue must be a "sex trafficking venture."[2] 632 F. App'x 272, 285-86 (6th Cir. 2016); *see also Paguirigan v. Prompt Nursing Emp't Agency LLC*, 286 F. Supp. 3d 430, 439 (E.D.N.Y. 2017) (must allege "participation in a venture that involves providing or obtaining labor"); *Noble v. Weinstein*, 335 F. Supp. 3d 504, 523-24 (S.D.N.Y. 2018) (must allege participation in a "sex trafficking venture"); *Ratha v. Phatthana Seafood Co.*, 2017 WL 8293174, at *4 (C.D. Cal. Dec. 21, 2017) (must allege participation in a "human trafficking venture"). *Cf. Bistline v. Parker*, 2019 WL 11870101, at *18 (10th Cir. Mar. 14, 2019) (allegations that "scheme set up by defendants was designed *expressly* for the purpose of facilitating" forced labor sufficient to state Section 1589(b) claim).

The magistrate judge disregarded these uniform and well-reasoned authorities, concluding instead that, to allege a venture under Section 1589(b), Plaintiff Means need only allege that the USOC was part of a "speculative commercial enterprise" of *any* kind with Steven Lopez, the alleged abuser. Rec. 24. Neither of the reasons proffered by the magistrate judge for this conclusion survive scrutiny. *First*, the magistrate judge dismissed the Sixth Circuit's careful statutory interpretation of Section 1591 of the TVPA in *Afyare*—under which the court determined that "venture" necessarily meant "sex trafficking venture," due to its "placement and purpose in the statutory scheme"—because here the SAC alleges a claim under Section 1589 of the TVPA, which, per the magistrate judge, "significantly differs from § 1591." Rec. 21. However, the pertinent language in these sister provisions is *identical*. *Compare* 18 U.S.C. § 1591(a)(2)

[2] Contrary to the magistrate judge's reasoning, Rec. 19, the USOC does not contend that Plaintiffs must allege a "*sex trafficking* venture" to state a claim under Section 1589(b), the *forced labor* statute. The USOC contends—and the plain statutory language requires—that the SAC must allege a "forced labor venture" to state a claim under Section 1589(b). Dkt. 155 at 2-3. The USOC referred to a "sex trafficking venture" in the context of its motion to dismiss Plaintiffs' claims under Section *1591(a)(2)*, which Plaintiffs later voluntarily dismissed. Dkts. 108 at 9-10; 155 at 2.

("participation in a venture which has engaged in" sex trafficking), *with* 18 U.S.C. § 1589(b) ("participation in a venture which has engaged in" forced labor). It is well-settled that principles of statutory construction provide that "identical words used in different parts of the same act are intended to have the same meaning." *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990); *see also Consolidation Coal Co. v. Dir. Office of Workers' Comp. Programs*, 864 F.3d 1142, 1147 (10th Cir. 2017).

Second, the magistrate judge stated that "no court of which I am aware has endorsed" the interpretation that the term "venture" in Section 1589(b) means "forced labor venture." Rec. 21. That is also wrong: numerous courts have endorsed this interpretation in the context of Section 1589(b), and many more have endorsed this interpretation in the context of identically worded provisions of the TVPA. *Supra* 2-3 (collecting cases).[3] The magistrate judge's departure from other courts' consistent interpretation of the meaning of the term "venture" in the context of the TVPA was error.

Even under the magistrate judge's reasoning, the SAC does not allege a "speculative commercial enterprise," Rec. 24, between the USOC and Steven Lopez. The magistrate judge determined that "the relationship between an athlete and the USOC" constitutes a "venture" for purposes of the TVPA. *Id*. 38. The only paragraph of the SAC to which the magistrate judge cites for this finding does not allege facts sufficient to describe any commercial relationship, contract, or agreement between the USOC and Steven Lopez (or any other Olympic athlete). *Id*. Rather, the paragraph contains the conclusory allegation that "[e]ach Olympic athlete has a direct commercial relationship with the USOC," and claims that the USOC "imposes a list of 'commercial

[3] The magistrate judge appears to fault the USOC for "rel[ying] on" a set of four cases that "do not involve claims brought under § 1589(b)," or are otherwise inapposite. Rec. 22-23. The USOC did not rely on those cases; it *distinguished* them in its reply brief because *Plaintiffs* improperly relied on them in their opposition. Dkt. 155 at 2-3. The USOC agrees those cases are inapplicable to the facts alleged here.

terms' upon each athlete as a precondition for participating." SAC ¶ 105. But the referenced list of "commercial terms," a screenshot of which is incorporated in the SAC itself, does not even suggest that the USOC *imposes* any "commercial terms" on athletes: the webpage informs athletes that the USOC "Athlete Ombudsman is available to offer athletes confidential advice regarding," for example, "Commercial/Sponsor appearances *for NGBs*," "*Individual* sponsorship agreements," and "Athlete Agreements containing commercial obligations" *imposed by NGBs. Id.* (emphases added).

The magistrate judge also found, without citation to any plausible supporting allegations in the SAC, that, but for the purported "speculative commercial enterprise" between Steven Lopez and the USOC, "Steven could not have obtained sexual services from Ms. Means." *See* Rec. 38. The Recommendation cites no authority suggesting that such an inquiry is relevant; in any event, the SAC does not contain any allegations to support this finding. The *only* allegation in the SAC relating to Steven Lopez's forced labor of Ms. Means that is not time-barred is the allegation that Mr. Lopez assaulted Ms. Means *at a private party* in 2013. SAC ¶ 707. None of the allegations in the SAC plausibly establish that this assault, which was unrelated to the Olympics or even taekwondo competition in general, would not have occurred in the absence of the purported "speculative commercial enterprise" between Steven Lopez and the USOC.

b) The SAC does not allege participation in a forced labor venture by the USOC.

The "participation" element of a Section 1589(b) claim requires plausible allegations of an "overt act" by the USOC in furtherance of the alleged forced labor venture. *Ratha*, 2017 WL 8293174, at *4-5; *see* Dkts. 108 at 9; 155 at 3. "[T]he relevant case law requires more than receipt of a passive benefit to satisfy the [TVPA's] participation in a venture element." *Ratha*, 2017 WL 8293174, at *4 (dismissing Section 1589(b) claim); *cf. Bistline*, 2019 WL 1187010, at *19 (allegations that defendant

lawyers were retained "for the purpose of developing a scheme to 'cloak' forced labor and ritual rape of young girls," that defendants "actively maintained and extended this scheme over the years," and that defendants used the scheme "to carry out the types of threats that compelled plaintiffs'. . . forced labor" sufficient to state Section 1589(b) claim). Liability under the TVPA "cannot be established by association alone"; "specific conduct that furthered the [forced labor] venture" must be alleged. *Noble*, 335 F. Supp. 3d at 524; *see Afyare*, 632 F. App'x at 285 ("Defendant's mere *membership* in the venture is insufficient if he is ignorant of the venture's [forced labor] activities (and the means and methods thereof).").

Although the magistrate judge acknowledged that the SAC must allege the USOC's "participation" in order to state a claim under Section 1589(b), nowhere in the Recommendation's findings is there any discussion of the USOC's participation in any alleged venture. *See* Rec. 38-40 (referencing only *Steven Lopez's* alleged participation). In fact, the magistrate judge misapplied the relevant legal standard, erroneously concluding that "[t]he USOC *need not be 'involved'* in obtaining forced labor or services to be civilly liable to a plaintiff" under the TVPA. *Id.* 39. No authority is cited for this statement, which contradicts all of the case law of which the USOC is aware interpreting the meaning of "participation" in the context of the TVPA. *Supra* 5-6.

Despite no finding that the USOC "participated" in the venture, the magistrate judge concluded that Plaintiff Means stated a Section 1589(b) claim against the USOC. This was clear error, and directly at odds with the Sixth Circuit's hypothetical in *Afyare*:

> [C]onsider a hypothetical defendant who joins a soccer team with some sex traffickers, who sponsor the team financially . . . using the money they generate from sex trafficking activities. And assume that . . . our defendant knows . . . that his teammate-sex-trafficker-sponsors are engaged in sex trafficking . . . though everyone agrees that our particular defendant does not [engage in sex trafficking], nor does he

> engage in any activities that further any aspect of the sex trafficking in any way. We agree with the district court and find that [the TVPA] targets those who participate in sex trafficking; it does not target soccer players who turn a blind eye to the source of their financial sponsorship. As a result, in this example, we would require the prosecution to prove that the defendant actually participated in a *sex-trafficking venture*. We would find it irrelevant that he played on a soccer team with sex traffickers[.]

632 F. App'x at 286. The same result is warranted here: that the USOC may have *some* relationship to Steven Lopez by virtue of his historical competition in the Olympics is irrelevant to the SAC's claim that the USOC knowingly *participated in a forced labor venture*. By not requiring that this key element be plausibly alleged, the magistrate judge's reasoning improperly "ensnare[s] conduct that the statute never contemplated," *id.* at 281, and would transform an institution's simple association with individuals into grounds for liability under federal sex trafficking, slavery, and forced labor laws based on those individuals' unrelated and independent conduct.

2. The Magistrate Judge Erred in Finding the SAC Alleged the USOC *Knowingly Benefitted From* the Alleged Forced Labor.

The SAC also lacks any plausible allegation that the USOC *benefitted* from its participation in any forced labor venture with Steven Lopez. 18 U.S.C. § 1589(b); *see Abaday v. Lombardi*, 2015 WL 13650493, at *4 (S.D. Miss. Jan. 30, 2015) (dismissing Section 1589(b) claim for failure to allege that movant "knowingly benefitted from any alleged violation of the [TVPA] by other Defendants").

The magistrate judge found that the SAC's allegation that Steven Lopez "competed in the [2016] Rio games"—*three years after* the only alleged forced labor at issue with respect to Claim 9—plausibly alleges that the USOC "benefitted from a venture with Steven." Rec. 39-40. Plaintiffs did not even allege this theory of "knowing benefit" in the SAC or in their Response to the USOC's Motion to Dismiss. Nor could

they: it is simply not plausible that any "benefit" to the USOC from Steven Lopez's competition at the 2016 Rio Olympics was at all tied to his unrelated alleged assault of Ms. Means in 2013, at a private party. *See Abaday*, 2015 WL 13650493, at *4 (requiring benefit *"from [the] alleged violation of the [TVPA]*" (emphasis added)).

B. Negligence (Claim 19 – All Plaintiffs)

1. The Magistrate Judge Erred in Finding That the USOC *Assumed* a Legal Duty.

To decide whether the USOC owed a duty to Plaintiffs, the magistrate judge correctly considered the factors articulated in *Taco Bell, Inc. v. Lannon*, 744 P.2d 43, 46 (Colo. 1987) (en banc), and correctly concluded that the USOC did *not* owe Plaintiffs a legal duty to investigate their allegations, or to conduct any such investigation with a certain level of care. Rec. 59-61. The magistrate judge highlighted that Plaintiffs were *former* athletes during the time period for their negligence claim (2016 to 2018), having been retired from competition for at least five years at that point. *Id.* 60. Because of their status as former athletes, he found that even a negligent investigation into the Lopez brothers would have posed little risk of injury to Plaintiffs during this time. *Id.*

Nevertheless, the magistrate judge found that the USOC *assumed* a duty "to reasonably investigate [Plaintiffs'] complaints of sexual abuse." *Id.* 63. Plaintiffs' briefing makes clear that they do not assert that the USOC had a duty *to act in the first instance*; instead, they assert that, to the extent the USOC did investigate Plaintiffs' allegations, it needed to do so in a reasonable manner. *See* Dkt. 139 at 50 (stating that Plaintiffs' claims are based on "malfeasance (acting badly)" rather than "nonfeasance (not acting)"). While a defendant can assume a duty by "voluntarily undertak[ing] to render a service," Colorado courts have made clear that this narrow doctrine applies only when: (1) the defendant "undertook to render a service that was reasonably calculated to prevent the type of harm that befell the plaintiff", *and* (2) the plaintiff "relied

on the defendant to perform the service or the defendant's undertaking increased plaintiff's risk." *Jefferson Cty. Sch. Dist. R-1 v. Justus ex rel. Justus*, 725 P.2d 767, 771 (Colo. 1986) (en banc); *see also P.W. v. Children's Hosp. Colo.*, 2016 CO 6, ¶ 21. The magistrate judge's analysis was flawed for four reasons.

First, the magistrate judge erred in analyzing the first prong of the test. He found that the SAC plausibly alleges this requirement because it describes the USOC's involvement in creating the U.S. Center for SafeSport ("SafeSport"), which investigated the Lopez brothers. Rec. 63. However, by federal statute, SafeSport conducts its investigations separately and independently, and moreover, it exercises jurisdiction *over the USOC* for purposes of the investigations.[4] Indeed, the magistrate judge highlighted these points in his separate Recommendation stating that SafeSport is immune from suit. Dkt. 217 at 3, 13. While the SAC asserts that the USOC "meddle[d]" in SafeSport's affairs, SAC ¶ 71, it does *not* allege that *the USOC* undertook any investigations. *See id.* ¶¶ 217, 236.[5] The SAC does not allege, for example that the USOC's personnel interviewed witnesses, drafted ethics complaints, or undertook any other sorts of activities typically conducted by investigatory bodies.

It cannot be overemphasized how different the SAC's allegations against the USOC are from the allegations that Colorado courts have found to establish an assumed duty: for example, a hospital admitting a patient that it knew was suicidal, *P.W.*, ¶ 21; an elementary school directly overseeing students as they leave school,

[4] 36 U.S.C. § 220541(a)(1) states that "The United States Center for Safe Sport shall serve as the *independent* national safe sport organization and be recognized worldwide as the *independent* national safe sport organization for the United States." (emphasis added). In addition, it provides that "The United States Center for Safe Sport shall exercise jurisdiction *over [the USOC]* . . . with regard to safeguarding amateur athletes against abuse . . . ." *Id.* § 220541(a)(2) (emphasis added).

[5] In fact, the SAC alleges that before SafeSport began its investigation, *USAT* investigated the Lopez brothers. SAC ¶ 217.

Jefferson Cty. Sch. Dist. R-1, 725 P.2d at 772; or a treatment center admitting a patient that it knew was abusing alcohol, *Wesley v. United Servs. Auto. Ass'n*, 694 P.2d 855, 857 (Colo. App. 1984). These cases involved a custodial relationship between the plaintiff and defendant. No such relationship existed between the USOC and Plaintiffs, *especially during 2016 to 2018, several years after Plaintiffs had stopped competing*.

Second, the magistrate judge failed to analyze the second prong of the test: that Plaintiffs "relied on [the USOC] to perform the service" or "[the USOC's] undertaking increased the plaintiff's risk" of harm. *Jefferson Cty. Sch. Dist. R-1*, 725 P.2d at 771. Without citing the SAC, Plaintiffs' briefing states that the USOC "induc[ed] Plaintiffs' reliance on USOC's help." Resp. 51. That conclusory legal argument is plainly insufficient to allege Plaintiffs' reliance. There are no allegations that Plaintiffs detrimentally relied on the USOC by, for example, choosing not to pursue different avenues of investigation. Furthermore, as described above and as stated by the magistrate judge, the SAC does not plausibly allege that any investigation during 2016 to 2018 could have created any risk of harm to *former* athletes. *See* Rec. 60.

Third, the magistrate judge's findings about the duties owed by the USOC and USAT are logically incompatible. The SAC alleges that, before SafeSport was created, USAT *directly undertook* an investigation into the Lopez brothers. *See* SAC ¶ 217. The SAC further alleges that, because of this investigation, and because of USAT's contacts with Plaintiffs, USAT "assumed a duty" to Plaintiffs. *Id.* ¶ 247. In addition, the SAC alleges that Plaintiffs were dues-paying members of USAT who had a "fiduciary relationship" with the organization. *Id.* ¶¶ 333-34, 41. Yet the magistrate judge correctly found these allegations insufficient to state a legal duty and dismissed the USAT from this claim. *See* Rec. 61-64. Just as the USAT did not assume a duty, neither could have the USOC—which did not undertake an investigation into the Lopez brothers and

with which the Plaintiffs did not have a "fiduciary relationship."

Fourth, the magistrate judge erroneously concluded that the question of whether the USOC assumed a duty requires factual development because it is a "mixed question of law and fact." *Id.* 61, 63. It is axiomatic that a complaint must allege facts that plausibly establish the elements of the claim, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and the SAC does not allege facts showing that the USOC assumed a duty.

2. The Magistrate Judge Erred in Finding That the SAC Alleges Actions Constituting Breach of the USOC's Purported Duty.

The magistrate judge did not consider the USOC's argument that the SAC fails to allege that the USOC *breached* any purported duty. *See* Dkts. 108 at 23; 155 at 13-14. That missing element is fatal to Plaintiffs' claim.

As noted above, Plaintiffs' briefing clearly states that their negligence claim is *not based on a failure to act*; rather, it is based on the USOC's alleged failure to reasonably conduct whatever investigation it undertook into Plaintiffs' complaints. *Supra*, 8. Yet neither the SAC nor Plaintiffs' briefing puts forth the standard of care for a "reasonable" investigation. And more importantly, *the SAC does not even allege that the USOC directly investigated Plaintiffs' allegations*, let alone that it did so negligently. Rather, the SAC alleges *USAT* and *SafeSport* conducted investigations. *Supra*, 9-10.

Instead, the SAC resorts to speculative and conclusory allegations that tangentially connect the USOC to *others'* investigations. The SAC alleges, for example, that USAT secretly consulted with the USOC and then delayed *USAT's* investigation into the Lopez brothers, SAC ¶ 226; the USOC underfunded SafeSport to slow down its launch, *id.* ¶ 944(g); and the USOC gave false testimony to Congress about irrelevant matters such as the size of the its budget, *see* Dkt. 108 at 14-15. This hodgepodge of allegations cannot establish breach of the USOC's purported duty to reasonably conduct the alleged investigation it undertook into Plaintiffs' allegations.

3. The Magistrate Judge Erred in Finding That the SAC Alleges That a Negligent Investigation Caused Cognizable Damages.

a) The SAC does not plausibly allege that a negligent investigation caused physical harm, and thus cannot state a claim based on emotional distress either.

While the SAC alleges physical harm suffered by Plaintiffs, those allegations relate only to the *pre-2014* sexual assaults that Plaintiffs suffered. None relate to 2016 to 2018, the relevant time period for Plaintiffs' claim, *see* Rec. 58. The magistrate judge cited just one paragraph purportedly alleging "physical symptoms" that could support Plaintiffs' claim, *see* Rec. 64, but that paragraph pertains to only one Plaintiff and describes harm suffered *before 2016*, *see* SAC ¶ 485.

Nor does the SAC allege that a negligent investigation into Plaintiffs' allegations *proximately caused* physical harm. It would not have been foreseeable that investigation into Plaintiffs' allegations between 2016 and 2018—years after Plaintiffs retired from competition and years after their last alleged contact with the Lopez brothers—would have posed a risk of physical harm to Plaintiffs. Rec. 60. *See Build It and They Will Drink, Inc. v. Strauch*, 253 P.3d 302, 306 (Colo. 2011) (en banc) (proximate cause requires that the harm was a "foreseeable" result of negligent act).

Finally, because the SAC fails to allege physical harm, Plaintiffs' negligence claim cannot proceed on the basis of emotional distress either. Colorado has "never recognized a cause of action for emotional distress grounded in negligence without proof that the plaintiff sustained physical injury or was in the 'zone of danger.'" *Culpepper v. Pearl St. Bldg., Inc.*, 877 P.2d 877, 880 n.3 (Colo. 1994) (en banc).

b) The SAC does not plausibly allege that a negligent investigation caused reputational or economic harm.

Furthermore, the SAC fails to include any allegations of reputational or economic harm that could meet the *Iqbal* pleading standard. *See Iqbal*, 556 U.S. at 678. It

contains only conclusory allegations that the delay of the investigations "harmed [the Plaintiffs'] reputations" and, in turn, their "prospects for employment" and "businesses." *See* SAC ¶¶ 482, 486, 516, 522, 577, 585–86, 595–96, 643, 652–53, 722. The SAC does not allege, however, a single example of a lost customer or employment prospect, or any remotely concrete allegations of reputational harm. Furthermore, the SAC fails to establish proximate cause because such harm would not have been foreseeable: the SAC does not allege, for example, that Plaintiffs were asked to share their reports publicly as part of any investigation into the Lopez brothers.

C. Gross Negligence (Claim 20 – All Plaintiffs)

The magistrate judge erred by failing to analyze whether the SAC alleges that the USOC acted with the culpability to establish *gross* negligence, even though the USOC highlighted the stringent standard for that claim. *See* Dkts. 108 at 24 n.12; 155 at 14.

Gross negligence is "conduct purposefully committed that the actor must have realized as dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety of others." John W. Grund *et al.*, 7 Colo. Practice - Personal Injury § 11:11 (3d ed. 2018); *see also Hamill v. Cheley Colo. Camps, Inc.*, 262 P.3d 945, 954 (Colo. App. 2011). Plaintiffs' gross negligence claim is based upon the same allegations as their negligence claim, SAC ¶¶ 950-59, and those allegations do not come close to meeting this high bar. There are no allegations that the USOC's personnel took actions during 2016 to 2018 that could have foreseeably put Plaintiffs—who had been retired from competition for years—in danger. Moreover, this claim cannot be based on speculation that other, unidentified athletes were put at risk.

It is also logically inconsistent to conclude that the SAC states a gross negligence claim against the USOC but not USAT. The SAC alleges that USAT *directly undertook* a flawed investigation into the Lopez brothers, SAC ¶ 217, and the

magistrate judge found this insufficient to state a claim. The lesser conduct attributed to the USOC therefore does not state a claim either.

D. Outrageous Conduct (Claim 21 – All Plaintiffs)

The magistrate judge erred in recommending that this claim proceed against the USOC. *First*, Claim 21, as pled, involves only *SafeSport's* conduct. SAC ¶¶ 960–66. The SAC alleges that it was outrageous for *SafeSport* to require Plaintiffs to provide live testimony during the proceedings against Jean Lopez, and for *SafeSport* to reinstate Jean Lopez in August 2018. *Id.* ¶¶ 962, 963(b). Indeed, the magistrate judge recognized that this claim is "primarily base[d] . . . on *SafeSport's decision* to reinstate Jean Lopez . . . ." Rec. 65 (emphasis added). The magistrate judge did not, nor could he, conclude that USOC participated in or controlled those proceedings. *See supra*, 9.

Nevertheless, the magistrate judge recharacterized the outrageous conduct claim based on one allegation under the heading of Claim 21: "Defendants . . . [c]ontinued to support and clothe Steven and Jean Lopez with the legitimacy and authority of Team USA despite having actual and constructive knowledge of their decades long pattern of serial sexual predation." *Id.* ¶ 963(a). That single, vague allegation—which refers generally to Defendants and not the USOC specifically—does not add to or change the claim pled by Plaintiffs. Plaintiffs pled outrageous conduct related only to *SafeSport's* disciplinary actions, for which the USOC cannot be liable, and moreover, it makes no sense for this claim to proceed in light of Plaintiffs' dismissal of SafeSport from this case, *see* Dkts. 217, 223.

Second, the magistrate judge failed to undertake the necessary analysis of outrageousness. A court "*must initially rule on the threshold issue* of whether the plaintiff's allegations of outrageous conduct are sufficiently outrageous as a matter of law." *Coors Brewing Co. v. Floyd*, 978 P.2d 663, 665 (Colo. 1999) (en banc) (emphasis

added). The SAC plainly fails to allege conduct that "[went] beyond all possible bounds of decency" and is "utterly intolerable in a civilized community." *See id.* at 666. The Colorado Supreme Court has found that, as a matter of law, it was *not* outrageous for a company to fire an employee in order to use him as a "scapegoat" for an "extensive criminal conspiracy involving illegal drugs and money laundering." *Id*. If *that* was not outrageous as a matter of law, then the SAC's allegations that SafeSport poorly prosecuted its case against Jean Lopez, or that Defendants wrongly allowed Jean Lopez to coach, do not meet that standard either.

Third, for the same reasons described in the preceding section, *supra*, 13, the SAC fails to allege the required culpability: that the USOC "intentionally or recklessly cause[d] severe emotional distress," *see Coors Brewing Co.*, 978 P.2d at 666.

III. The Court Should Dismiss the USOC from This Action with Prejudice

The Court should dismiss the SAC's claims against the USOC with prejudice. *See Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172, 1189 (10th Cir. 2012). Plaintiffs have effectively amended their complaint *three times*—the first time as of right (Dkt. 6), the second time with Defendants' agreement after the first round of Motions to Dismiss (Dkt. 64), and a third time in response to the second round of Motions to Dismiss (Dkt. 139 at 3-4). Even after those amendments, the SAC fails to state any claims against the USOC as a matter of law, and there are no allegations that can cure that defect. *See* Dkt. 201 (USOC's opposition to Plaintiffs' motion to amend again; describing at length why Plaintiffs failed to identify any facts warranting another amendment).

IV. CONCLUSION

The USOC respectfully requests that this Court adopt in part and reject in part the Recommendation of the United States Magistrate Judge, grant the USOC's Motion to Dismiss, and dismiss the USOC from this action with prejudice.

Date: March 20, 2019

/s/ David M. Jolley

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CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing was filed using the Court's CM/ECF filing system, which automatically sends notice of filing to all attorneys of record, on March 20, 2019.

/s/ David M. Jolley
David M. Jolley